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IN THE

Supreme Court of the United States

No. 919—October Term, 1965

IRVING W. POWLESS,

Petitioner,

vs.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The New York State Tax Commission, the respondent herein, ruled that the petitioner, a member of the Onondaga Tribe of Indians, residing on the Onondaga Reservation in the State of New York, was subject to the New York State income tax on income earned by him as a mechanic employed by the Chrysler Corporation in Syracuse, New York (Appendix I to Petition, pp. 1a-3a).

The Appellate Division of the New York Supreme Court confirmed the determination of the respondent (Appendix II to Petition, pp. 4a-5a). Its opinion is reported in 22 A. D. 2d 746 (Appendix III to Petition, pp. 5a-6a). The Appellate Division approved the reasoning of the Court

in *State Tax Commission* v. *Barnes*, 14 Misc. 2d 311 (County Court, Franklin Co., 1958), and held that "Indians living on a reservation were subject to state income tax on income derived from wages. The petitioner here, regardless of his status as a tribal member, was under no statutory restriction as to employment and his earnings did not differ from those of any other resident of the State of New York."

The Court of Appeals affirmed, without opinion, the order of the Appellate Division (Appendix IV to Petition, pp. 7a-9a). The decision of the Court of Appeals is reported in 16 N. Y. 2d 946 (1965)

Jurisdiction

Jurisdiction is invoked by petitioner under 28 U. S. Code, § 1257(3).

Question Presented

Is an Indian who is a resident of an Indian Reservation in the State of New York subject to the payment of the New York State tax on personal income earned by him off the reservation as an employee of a private employer?

Statutes Involved[1]

FEDERAL

25 U. S. Code § 177
25 U. S. Code § 232
25 U. S. Code § 233

STATE

Tax Law, Art. 16, § 350
Tax Law, Art. 16, § 351

[1] See appendix hereto.

Statement

The respondent accepts the petitioner's statement of the facts.

Reasons for Denying Petition for Certiorari

This Court many years ago determined the question presented adversely to the Indians (*Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420, 421 [1936]). The petitioner is simply seeking to relitigate the question.

Summary of Argument

The argument of the petitioner boils down to this:

That Tax Law, Article 16, which deals with the tax upon personal income, cannot apply to him or to other Indians who reside on reservations because the State lacks power to impose the tax. Essentially, this purported lack of power is predicated upon the following alleged grounds:

(1) Complete lack of general or specific federal authority or approbation of such power or right;

(2) Immunity of reservation Indians to the tax by reason of certain treaties, statutes and decisional law.

It is the respondent's contention:

(1) That the petitioner, in particular, and all Indians in New York, generally, whether they reside on or off the reservations, do not enjoy an immunity to the State personal income tax, whether the alleged claim of immunity is based upon treaties, statutes or decisional law; and that, as a matter of fact, they have been statutorily subjected to the obligation to pay the tax (See Point I, *infra*);

(2) That federal authority or approbation of the State's sovereign power to impose the tax is not required (See Point II, *infra*);

(3) Assuming, *arguendo*, that federal authority or approbation is required to support the State's power to impose the tax, the fact of the matter is that such federal authority has been expressly statutorily granted (See Point III, *infra*).

ARGUMENT

POINT I

The New York Indians are subject to the State's personal income tax and cannot claim tax immunity.

A. No express statutory immunity has been conferred upon the Indians.

Article 16 of New York's Tax Law is inclusive in its language, imposing a "tax upon every resident of the state" (§ 351), which, by statutory definition, covers, among others, "any person domiciled in the state" (§ 350). The fact that the petitioner is an Indian does not give him any exemption from the State income tax. This was decided as to the Federal income tax in *Choteau* v. *Burnet*, 283 U. S. 691, 693-4 (1931)[2] and as to State income taxes in *Leahy* v. *State Treasurer of Oklahoma*, 297 U. S. 420 (1936).

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[2] The federal statute in the cited case affected the income of "every individual" "from any source whatever." Choteau's income, like the petitioner's income, was unrestricted in character. This Court said (p. 694): "The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. *The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does.*" (Emphasis added.)

The fact that the Indians reside on the reservation or elsewhere does not affect their liability to pay State income taxes so long as they are residents of New York (*The Cherokee Tobacco,* 11 Wall. 616, 619-620 [1870]; *Choteau* v. *Burnet, supra; Kake Village* v. *Egan,* 369 U. S. 60, 72 [1962]).

B. No tax immunity may be inferred.

Since neither the Tax Law nor any other statute expressly exempts the income of an Indian, and since the intent to exempt must be expressly stated, "it is not for this Court to make the exception" (*The Cherokee Tobacco, supra,* at page 620). The Tax Law is clear, explicit and unambiguous. "There being no room for ambiguity there is no room for construction. * * * The section must be held to mean what the language imports" (*The Cherokee Tobacco, supra,* at page 620. See also, *United States* v. *Stewart,* 311 U. S. 60, 71 [1940]).

The status of the Indian does not imply immunity (*Choteau* v. *Burnet, supra,* page 694; see also, *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue,* 295 U. S. 418, 420-1 [1934]; *Oklahoma Tax Comm.* v. *United States,* 319 U. S. 598, 606-8 [1942]; *Leahy* v. *State Treasurer of Oklahoma, supra*). In the last cited case this Court said (p. 421):

> "As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the state."

In the case at bar the State income tax was based on wages earned by the petitioner as a mechanic employed by the Chrysler Corporation. This was certainly unrestricted income. (See *Canary* v. *Oklahoma Tax Comm.,* 295 P. 2d 281 [Okl., 1956].)

POINT II

Federal authority or approbation of the State's sovereign power to impose the tax under Article 16 of the tax law is not required.

The possession by the national government of protective jurisdiction over Indians has not been determined to be an exclusive power nor has it been exercised in plenary fashion so as to leave no room for the States to assert their authority in furtherance of their own internal welfare as well as that of the Indians. Constitutionally there must be found a complete surrender of sovereignty to the Federal Government before the reserved powers of the State will give way (*United States* v. *Holliday*, 3 Wall. 407 [1865]; *United States* v. *McGowan*, 302 U. S. 535, 539 [1937]; *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556, 560, 562-4 [1961]).

The Indian Non-Intercourse Act (25 U. S. Code, § 177) which refers to treating with the Indians only with the approbation of a Federal Commissioner, upon which the petitioner herein heavily relies, refers, by its terms, only to transactions involving the alienation of Indian lands. It has no relevancy to the issue involved herein (*Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue, supra*, at page 421).

POINT III

Assuming, *arguendo*, that Federal authority or approbation is required to support the State's power to impose the tax, such authority has been expressly statutorily granted.

It has been the avowed policy of the Federal Government gradually to bring the Indian to an end of his old disabilities and dependency. To this end dealings by treaty were

abolished in 1871 (25 U. S. Code, § 71 and citizenship granted in 1924 (8 U. S. Code, § 1401). But Congress has gone much further with respect to the New York Indians. In 1948 the State of New York was statutorily *recognized* as having exclusive criminal jurisdiction over Indian offenses (25 U. S. Code, § 232; 62 Stat. 1224; July 2, 1948, c. 809), and in 1950 (effective September 13, 1952) Indians in New York were subjected to the civil laws of the State (25 U. S. Code, § 233; 64 Stat. 845; Sept. 13, 1950, c. 947).

It is obvious from the foregoing that the Indians in New York State have been subjected to the same civil obligations as apply to citizens generally and to the same civil jurisdiction of the State as is applicable to non-Indians. They were thereby given, as correlative rights, the same rights as are possessed generally by others.

It is submitted that, with the exceptions set forth in 25 U. S. Code, § 233, which are inapplicable to the case at bar, the New York Indians have been legally assimilated into the polity which is the "People of the State of New York."

Conclusion

The petitioner's contentions have so consistently and repeatedly been decided by this Court adversely to such contentions that it cannot be said that there exists here a substantial federal or constitutional question.

We respectfully request this Court to deny the Petition for Writ of Certiorari.

Dated: Albany, New York, January 31, 1966.

Respectfully submitted,

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APPENDIX

Federal Statutes

8 U. S. Code, § 1401.

"Nationals and citizens of United States at birth.

"(a) The following shall be nationals and citizens of the United States at birth:

* * *

"(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

* * *"

25 U. S. Code, § 71.

"Future treaties with Indian tribes.

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

25 U. S. Code, § 177.

"Purchases or grants of lands from Indians.

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such

treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. (R. S. § 2116.)"

25 U. S. Code, § 232.

"Jurisdiction of New York State over offenses committed on reservations within State.

"The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, that nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights." (July 2, 1948, c. 809, 62 Stat. 1224.)

25 U. S. Code, § 233.

"Jurisdiction of New York State courts in civil actions.

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons

to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, that the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And Provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving

Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." (Sept. 13, 1950, c. 947, § 1; 64 Stat. 845.)

New York Statutes

Tax Law, Art. 16 Taxes Upon And With Respect to Personal Incomes.

"§ 350. Definitions.

"For the purpose of this article and unless otherwise required by the context:

* * *

"7. The word, 'resident' applies only to natural persons and includes any person domiciled in the state, * * *."

"§ 351. Imposition of income tax on net incomes and net capital gains.

"A tax is hereby imposed upon every resident of the state, * * *."